F. M. S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

July 28, 1939.

PUBLIC PROSECUTOR v. HOW KIM KOK.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 35 of 1939]

Sanitary Boards Enactment (Cap. 137) Ss. 15, 17(i) Sanitary Board By-laws, Part VIII, By-law 1(i) —Storing timber without being licensed—Regulation of dangerous trades—Validity of By-law.

The respondent was charged with and acquitted of the offence of storing timber and attap without being licensed in contravention of By-law 1 (i) Part VIII of the Sanitary Board By-laws. The Public Prosecutor appealed. At the hearing of the appeal the respondent contended that the By-law requiring a licence to store timber is **ultra vires.**

Held, the By-law is **intra vires** and that the respondent should have been convicted of the offence with which he was charged.

Cases referred to:—

(1) *Kruse v. Johnson,* (1898) 2 Q.B. 99.

(2) *Municipal Commissioners v. Syed Abdulrahman bin Shaikh Alkaff,* 6 M.L.J. 183; (1937) S.S.L.R. 150.

(3) *Public Prosecutor v. Lye Yen Khoy,* 8 M.L.J. 249.

(4) *R. v. Plummer,* (1902) 2 K.B. 339.

MAGISTRATE'S CRIMINAL APPEAL.

The facts sufficiently appear from the judgement below.

A. J. Grattan-Bellew, Assistant Legal Adviser, for the Public Prosecutor (Appellant) referred to Section 173 (b) of the Criminal Procedure Code (Cap. 6), *Mallal's* Commentary and *R. v. Plummer,*[4] *Kruse v. Johnson,*[1].

As the facts disclosed in the charge constituted an offence and as it was not alleged that the defendant did not understand the nature of the charge or what he was doing when he pleaded guilty the Magistrate was not entitled to exercise his discretion and allow the plea to be withdrawn. In any event, the evidence of the defendant not only corroborated that of the prosecution but in fact admitted the offence.

P. C. Au-Yong, for the Respondent referred to *Municipal Commissioners v. Syed Abdulrahman bin Shaikh Alkaff & ors.*[2] and *Kruse v. Johnson*[1]. He submitted that the By-law of the Sanitary Board requiring a licence to store rubber was *ultra vires* in so far as it affected this case. The trade must be a dangerous, unhealthy or offensive one before the Board could impose any restriction (section 15 J of the Sanitary Boards Enactment). There was no evidence to this effect. Therefore the By-law imposing a licence is *ultra vires.* Alternatively, if a licence is necessary, the Board acted wrongly in refusing the respondent a licence on the ground that his timber depot was not at least 50 feet away from any dwelling house—a new ruling described by the Chairman.

Such a ruling cannot apply to existing buildings at all, and even in the case of new buildings, if it is applicable at all, it should be applied benevolently. See *Public Prosecutor v. Lye Yen Khoy*[3], the judgment of Terrell, Ag. C.J. at p. 251. "It is a proper rule of construction.....and that if and so far as they are intended to apply to existing buildings they are *ultra vires.*"

Cur. Adv. Vult.

Poyser, C.J.—The respondent, on the 6th of April 1939, appeared before the third Magistrate, Kuala Lumpur, on the following charge:—

> "That you did continue to use T.B. No. 381 & 382 Pudu Road within Kuala Lumpur Sanitary Board area on 14.3.39 for depositing timber for trade purposes without being licensed in that behalf—contrary to by-law 1 (i) Part VIII and punishable under section 17 (ii) of the Sanitary Boards Enactment (Cap. 137)".

He pleaded guilty, and sentence was postponed to the 20th of April. On that date the respondent was allowed to withdraw his plea of guilty, and the trial was fixed for the 4th of May before the second Magistrate. The latter, after hearing the evidence, acquitted the respondent. The Public Prosecutor appeals against such decision.

The first ground of appeal was that the second Magistrate had no jurisdiction to try the case, as the third Magistrate had already accepted the respondent's plea of guilty. This ground was however not pressed, as the Deputy Public Prosecutor was not aware that the third Magistrate had allowed the plea of guilty to be withdrawn and fixed the trial before another Magistrate.

The third Magistrate undoubtedly had a discretion in regard to permitting the withdrawal of the plea of guilty, and I do not think it can be said that he exercised his discretion wrongly. The material section of the Criminal Procedure Code is section 173 (b), and it has been frequently held, not only under this section but also under the English criminal law,

that a Court may, in its discretion, allow an accused person to withdraw a plea of guilty. It is unnecessary to refer to any specific decision; a number are referred to in *Mallal's* Criminal Procedure Code of the Straits Settlements, 2nd edition, page 184, in connection with section 178(b) of that Code which is identical with section 173(b) of the Federated Malay States Code. No doubt in a number of cases this discretion should not be exercised, but in the present case, the decision of which depended on questions of law and the interpretation of Sanitary Board by-laws, I think that the third Magistrate was right in allowing the respondent, who was unrepresented when he pleaded guilty, to withdraw his plea.

The second ground of appeal was that the second Magistrate was wrong in holding that the facts did not establish that the respondent had committed any offence.

The facts were not in dispute and briefly are as follows. The respondent is the owner of a timber depot in Pudu Road. Up to 1937 he had a licence to store timber and attap at this depot, but this licence was withdrawn at the end of 1937. On the 11th of March 1938 the respondent was informed by letter (Exhibit P1.) that a further licence would not be issued as the premises were not considered suitable, and that the premises must not be used as a timber depot after the end of June 1938.

This letter was written in consequence of a ruling by the Chairman of the Sanitary Board that all timber depots must be 50 feet away from dwelling houses. The respondent attempted to obtain a new site, but did not succeed. He admitted that the timber and attap he stored were highly inflammable, but stated that he had nowhere to remove them to.

On these facts the Magistrate held that it was not possible for the respondent to comply with the ruling of the Chairman of the Sanitary Board, as he could not get another suitable place for his timber, and he added:—

> "The defendant first got permission for this depot and subsequently such permission was withdrawn to enforce a ruling which in my opinion applies subsequent to the date of the ruling".

I do not understand this passage. It may be due to the argument on behalf of the respondent that the Chairman's ruling was unfair, inequitable and *ultra vires;* but whatever it was due to, the Chairman's ruling has not the effect of a by-law. The so-called ruling in effect sets out the Chairman's reasons for refusing to renew the respondent's licence, and the Chairman has power to revoke any licence issued by him under any by-law (section 19 of Cap. 137).

I do not consider that the Chairman's action was unfair; he gave the respondent over three months in which to find fresh premises (Exhibit P1.), and section 19 of Cap. 137 permits of one month's notice only of revocation of any licence being given. Further, it does not appear unreasonable to require highly inflammable material to be stored at least 50 feet away from dwelling houses.

The Magistrate, in my opinion, was clearly wrong in discharging the respondent for the reasons he did. On the facts before him there was, in my opinion, no defence to the charge, and the respondent should have been convicted. Assuming the respondent had difficulty in obtaining another site on which to store timber, that is no reason why he should disregard a by-law, and increase the risks of fire to dwelling houses.

It was also argued on appeal, but apparently not before the Magistrate, that the by-law in question was *ultra vires,* as it did not come within any of the powers conferred on a Sanitary Board by section 15 of Cap. 137. In regard to this argument it is quite clear, in my opinion, that the Sanitary Board had power to make this by-law. Section 15 (i) (j) provides *inter alia* for the regulation of dangerous trades or occupations, and the storage of highly inflammable material clearly comes within that sub-section.

The appeal must be allowed, and the respondent found guilty of the offence with which he was charged. In regard to sentence, I was informed that the respondent had been convicted twice before for the same offence, but that on such occasion was only fined small sums; he cannot be so leniently dealt with on this occasion. I impose a fine of $100 or in default one month's rigorous imprisonment, and would remind the respondent that under section 17(ii) of Cap. 137, if he continue the offence, he is liable to a fine of $10 a day for every day during which such offence is continued.

Appeal allowed.